A

LEONG KEE CHUNG & ORS

v.

SABAH PORT AUTHORITY & OTHER CASES

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[K22-137-2005-I, K22-10-2006-I & K22-104-2009-I]
22 MARCH 2010

C ***LABOUR LAW:*** *Employment - Retirement benefits - Whether plaintiffs entitled to retirement benefits - Whether plaintiffs' claim time barred*

LABOUR LAW: *Provident Fund - Contributions - Whether defendant defaulted on EPF payments - Whether plaintiffs estopped from claiming EPF entitlement - Whether claim for EPF benefits time barred*

D

LIMITATION: *Striking out action on ground of time bar - Claim against government - Limitation Ordinance (Cap 72) (Sabah), item 97 of Schedule - Whether plaintiffs' action time barred*

E The plaintiffs were retired ex-employees of the defendant. During their employment, the plaintiffs were provided with a retirement benefit scheme ('RBS') from 1969 to 1981. Under the RBS, the defendant was not required to make EPF contributions. The Government then implemented a new scheme in 1975 whereby F the defendant was required to make EPF contributions until the plaintiffs reached a pensionable status. The RBS was terminated on 1 March 1981. Upon their retirement, 157 plaintiffs opted for a full pension scheme ('Option 1'). This option meant that the plaintiffs would only receive partial EPF contributions. The portion G of the defendant's EPF contributions for them would be remitted to the Government. As for the other eight plaintiffs, they opted for a reduced pension ('Option 2') which meant that they would receive full EPF benefits.

H The plaintiffs claimed for loss of EPF benefits for: (i) the probationary period of 12 months before the RBS came into effect *ie*, in the 1970's; (ii) the period between the implementation of the new scheme to the termination of the RBS on 1 March 1981; and (iii) the period from 1 March 1981 to 31 December 1984 (the year when the last of the 165 plaintiffs reached pensionable I

status).The plaintiffs also claimed for the difference in the retirement benefits actually paid and which would have been paid under the RBS if it were not terminated.

Held (dismissing the plaintiffs' claim):

(1) The plaintiffs were not entitled to claim EPF benefits as the claims were not made within the six-year period as provided in item 97 of the Schedule to the Limitation Ordinance (Cap 72) (Sabah). (para 7)

(2) By choosing Option 1, the 165 plaintiffs had agreed to the transmission of funds to the Government and thus were estopped from making a claim for the period of 1 March 1981 to 31 December 1984. As for the eight plaintiffs who chose Option 2, there was no evidence to show that the defendant had defaulted in its EPF contributions. (paras 9-11)

(3) The plaintiffs' claim for the difference in the retirement benefits was time barred. The plaintiff had failed to bring the action within the six-year period stipulated in item 97 of the Schedule to the Limitation Ordinance (Cap 72) (Sabah). Furthermore, it was not shown that the RBS was a better scheme from the one which they opted for. (para 14)

Legislation referred to:
Employees Provident Fund Act 1991, s. 52(1)
Limitation Ordinance (Cap 72) (Sabah), Sch Item 97
Statutory And Local Authorities Pensions Act 1980, s. 31
Statutory And Local Authorities Pensions Regulations, reg. 10(1)

For the plaintiffs - S Vanugopal (Christina Liew with him); M/s CJ Liew & Co
For the defendants - Alex Siew; M/s Alex Siew & Co

Reported by Melinda Robert

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiffs' claim against the defendant (SPA) is twofold which are:

1. The loss of the EPF contributions for the following periods:

   a. For the probationary period of 12 months prior to RBS,

   b. From the implementation of the Harun Scheme to the termination of the RBS on 1 March 1981,

   c. From 1 March 1981 to pensionable status,

   d. From pensionable status to conferment of pensionable status – 31 December 1984,

2. The difference in the retirement benefits actually paid and that which would have been paid under RBS if it had not been discontinued.

Background Facts

[2] SPA is a statutory authority and all the 165 plaintiffs are retired ex-employees of SPA. From 1969 to 1981, SPA had a retirement benefits scheme for its employees called the Retirement Benefits Scheme (RBS). RBS was an "approved fund" under the relevant EPF legislation which meant both SPA and its employees were not be required to make EPF contributions. The RBS was an insurance policy taken out with Great Eastern Assurance Co. Ltd with a sum assured for each employee payable upon the retirement (or death) of the employee. Under the RBS, SPA alone paid the premium of the policy amounting to 20% of the salary of the employee. Sometime in 1975, the Government introduced the Harun Scheme which placed employees on a salary and pension scheme similar to the salary and pension scheme of Government employees and require schemes like the RBS to be terminated. In 1978 there was further revision which resulted in Harun scheme/CCR scheme. The employees of SPA were given an option whether to opt for the Harun Scheme/CCR Scheme or to remain on the pre-existing salary/benefits scheme of the SPA. All the plaintiffs opted to come under the Harun Scheme/CCR Scheme. As part of the Harun Scheme/CCR Scheme, the Government directed that the RBS be discontinued, with the employees of SPA to be put on a pension scheme. One of the conditions of this scheme is that employees with ten years or more service upon the discontinuance of the RBS were accorded pensionable status, with SPA having to make contributions of 17½% of the

employee's salary to the federal Consolidated Fund (and subsequently Kumpulan Wang Amanah Pencen or "KWAP") to go towards the payment of the employee's pension in the future. In respect of employees who have not served ten years as at March 1981, SPA and the employees are required to make contributions to the EPF until such time such employees reached ten years of service which will confer them pensionable status.

[3] After taking into account of the wishes of the employees of SPA, the RBS was only terminated on 1 March 1981 and not on 1 July 1979 as wished by the Government.

[4] With the termination of the RBS, all employees were requested to make a choice which was this:

1. To have the policy reassigned to them, with them having to pay back to SPA all the premiums paid so far and with them having to pay future premiums or

2. To have the policy converted into a "paid-up" policy in accordance with cl. 6(a) of the policy, with a reduced sum assured reflecting that no more premiums would be paid (RBS Proceeds) and with the RBS Proceeds when payable upon maturity (ie, retirement or death) either (i) remitted to the Consolidated Fund for those employees opting for a full pension and full gratuity calculated from the date of employment or (ii) remitted to the employees for those opting for a reduced pension and reduced gratuity, calculated from the date of reaching pensionable status.

[5] All the plaintiffs opted for the second choice of converting the policy into a paid up one. On retirement the plaintiffs were given two choices as well and they are as follows:

Option A	**Option B**
Full Pension (calculated from date of joining service)	Reduced Pension (calculated from date of pensionable status)
Full Gratuity (calculated from date of joining service)	Reduced Gratuity (calculated from date of pensionable status)

EPF contributions by the employee (ie, the employee's share)	EPF contributions by both SPA (employer's share) and employee (employee's share)
[EPF contributions by SPA (the employer's share) and RBS Proceeds to be remitted to Government under Section 10(1) of the SALA Pensions Regulations]	RBS Proceeds

It is undisputed that all the plaintiffs had retired prior to the filing of these suits and 157 of the plaintiffs had opted for option A and 8 plaintiffs opted for option B.

Issues

[6] From the evidence and submissions made by counsel, there are in essence two issues:

1. Are the plaintiffs entitled to claim EPF payment from the defendant?
2. Are the plaintiffs entitled to claim for the difference in the retirement benefits?

Issue 1

Are The Plaintiffs Entitled To Claim EPF Payment From The Defendant?

[7] As stated above, there are four periods of claim and I shall consider them individually on the assumption that the defendant is liable to pay EPF contributions and in the light of the Sabah Limitation Ordinance.

a. The probationary period of 12 months prior to RBS.

It is undisputed that the claim for the EPF contributions of the employees' portion goes back to the 1970s. Hence assuming that the defendant had not paid these contributions, the liability accrues well back in 1970s and by any stretch of imagination, the claims are time barred by the Sabah Limitation Ordinance which pursuant to item 97 only provides for six years.

Accordingly these claims fail,

b. The period from the implementation of the Harun scheme (15 January 1975) till the termination of the RBS (1 March 1981).

Again assuming that the defendant is liable to pay, their liability arises well back to the late 1970s and the early 1980. The right to sue in my view accrues latest on 1 March 1981 and again the plaintiffs are also caught by the six years limitation period as mentioned earlier. Accordingly these claims fail.

c. The third and fourth period mentioned earlier can be dealt with together as all the plaintiffs had been conferred pensionable status on or before 31 December 1984.

Again assuming the defendant is liable to pay the EPF contributions, that liability to pay dates back to the early 1980s. The last day would be 31 December 1984 and the right to sue would accrue latest on that day which makes the limitation period end on 31 December 2000. The first suit filed in this matter is 2005 which again would infringe the limitation period. Accordingly these claims fail.

[8] As I have stated earlier, my consideration was based on the assumption that the defendant was liable to pay EPF contributions for the four periods. However I wish to make known my view whether the defendant was in fact liable to pay EPF contributions. For the period of the RBS regime which ended in 1 March 1981, there is no doubt in my mind that the defendant had no liability to pay as it was an approved fund under the EPF Act (s. 52(1)) which means no contribution is required.

[9] The next period would be from 1 March 1981 (the date in which the RBS was terminated) to 1984 (the year when the last of 165 plaintiffs reached pensionable status). As stated by earlier, 157 of the plaintiffs had opted for option A and 8 plaintiffs opted for option B. In respect of 157 plaintiffs I agree with counsel for the defendant that under option A, the defendant's contributions were required under reg. 10(1) of the Statutory and Local Authorities Pensions Regulations to be remitted to Government under the Consolidated Fund. In any event as pointed out by counsel for the defendant the 157 plaintiffs had agreed to this transmission by choosing option A and hence are now estopped from making the claims.

[10] As for the eight plaintiffs, their details are these:

Name	Date of Employment	Date of Reaching Pensionable Status	Date of Retirement
Mohd Yacob bin Endin Akus	13 July 1972	1 April 1984	10 February 1997
Mahalan bin Jubair	1 July 1971	1 June 1983	30 August 1993
Pang Shu Lin	25 November 1968	1 March 1981	19 December 1995
Kassim bin Taris	16 October 1969	1 March 1981	31 December 1994
Laija bin Laaddu	20 November 1973	1 December 1983	20 July 1991
Indin bin Othman	25 November 1968	1 March 1981	7 May 1995
Lee Kim Hin @ Lee Ah Kum	1 September 1968	1 March 1981	27 February 1993
Su Vui Khiong	1 September 1968	1 March 1981	9 March 1995

[11] In this case there is no evidence before the court that the Board has taken any action against the defendant for failing to comply with its statutory duty to pay into the EPF. That *prima facie* means that the defendant had fulfilled its statutory duty under the EPF Act. Be that as it may, the eight plaintiffs who opted for option B in any event are as stated earlier barred by item 97 of the Limitation Ordinance which provides for a six year period commencing from "when the right to sue accrues". With that I move on to the next issue.

Issue 2

Are The Plaintiffs Entitled To Claim For The Difference In The Retirement Benefits?

[12] The plaintiffs' contention stems from s. 31 of the Statutory and Local Authorities Pensions Act 1980 which states as follows:

31. Winding up of pension scheme

(1) The fund of a pension scheme of a statutory or local authority under the New Scheme shall be wound up on such date as the Minister of Finance may, in each particular case by notification in the Gazette appoint, and upon winding up of such fund all assets shall be transferred to, and the liabilities charged on the Federal Consolidated Fund.

(2) Notwithstanding any written law to the contrary, upon the winding up of the fund of the pension scheme of a statutory or local authority, the pension authority shall exercise the powers and perform the duties of the appropriate authority of such scheme.

(3) Nothing in this section shall be deemed to diminish the amount of pension, gratuity or other benefit to which an employee would have been eligible if not for this section.

[13] Counsel for the defendant submits that reliance on s. 31 is misplaced as it refers to circumstances whereby the fund of a pension scheme of an authority is wound up and its assets transferred to the Consolidated Fund upon a decision of the Minister of Finance. In the present case, he submits that the RBS was in a form of an insurance policy with a lump sum assured payable upon the retirement (or death) of the employee and thus not a pension scheme. Having read the above section with care and giving an interpretation to it in its ordinary meaning, I agree with the contention of the defendant that the plaintiffs' cause of action is misplaced.

[14] In any event this claim cannot overcome the hurdle of the Limitation Ordinance as the RBS was terminated in March 1981 and the three suits commenced well after the limitation period of six years allowed by law. Furthermore I cannot fathom how the plaintiffs can prove that the RBS was more beneficial in that the scheme which they opted for after the RBS are of a different nature in that it provides for pension payments until death. Their attempt to prove it with respect is neither here or there, hence I have no hesitation in concluding that they have failed in discharging their burden of proof.

[15] For all the reasons stated above, the plaintiffs' claims are dismissed with costs to be taxed unless agreed to the defendant.